PERWIRA HABIB BANK MALAYSIA BHD

v.

VALIANT LEATHER PRODUCTS (M) SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
MOHD GHAZALI J
[SUIT NO: C3943 OF 1985]
30 NOVEMBER 1999

CIVIL PROCEDURE: *Execution - Application for leave to issue writ of execution - Rules of the High Court 1980, O. 46 r. 3(2) - Delay of more than eleven years since date of judgment - Whether reasons for delay must be provided - Whether reasons given sufficient*

CIVIL PROCEDURE: *Solicitor - Change of solicitors - Omission to file and serve notice of change - Rules of the High Court 1980, O. 64 r. 1(1) - Whether fatal to appeal*

The plaintiff obtained summary judgment ('the judgment') against the defendant in 1986. In 1988 the plaintiff filed a writ of sale and seizure and was granted leave to forcibly enter the 3rd defendant's premises. In 1989 the plaintiff obtained a prohibitory order over a piece of land of the 3rd plaintiff.

Thereafter in 1998 the plaintiff filed an *ex parte* application against the 3rd defendant for leave of the court to enforce the judgment pursuant to O. 46 r. 2(1)(a) of the Rules of the High Court 1980 ('the RHC') as more than six years had lapsed since the date of the judgment.

The senior assistant registrar ('SAR') granted leave to the plaintiff. Hence, this appeal by the 3rd defendant.

The plaintiffs argued that there was an omission to file and serve a notice of change of solicitors pursuant to O. 64 r. 1 of the RHC by the 3rd defendant.

The 3rd defendant on the other hand stated, *inter alia*, that the summary judgment entered against him was obtained more than 11 years ago and that the plaintiff never forwarded any appropriate reasons as to the said delay.

Held:

[1] Order 46 r. 3(2)(b) of the RHC clearly states that the applicant must state the reasons for delay in enforcing the judgment. No sufficient reasons for the delay in making the application were presented.

[2] In relation to the omission to file and serve a notice of change of solicitors, the 3rd respondent should have complied with O. 64 r. 1 of the RHC. However, as it was not clear as to whether the SAR dismissed the defendant's application on this point, and looking at the circumstances of the case, such an omission was not fatal. To rule otherwise would cause injustice to the 3rd defendant, as surely he could not be faulted for the said omission.

[Appeal allowed. Leave granted by SAR set aside.]

Case(s) referred to:
Tio Chee Hing v. Chung Khiaw Bank Ltd [1981] 1 MLJ 227 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14, O. 42 r. 2, O. 46 rr. 2(1)(a), 3(2)(b), O. 64 r. 1

For the plaintiff - J Doshi; M/s Abdullah & Zainuddin
For the 3rd defendant - S Gunavathi; M/s Thiyages Pauline Ng & Co

Reported by Sherin Kunhibava

JUDGMENT

Mohd Ghazali J:

Vide letter dated 1 April 1982 the plaintiff, a bank, granted the first defendant bridging loan facilities to the extent of RM1.5 million. The first defendant accepted and utilised the said facilities. In consideration of the plaintiff granting the aforesaid facilities, the second, third and fourth defendants *vide* letter of guarantee dated 24 December 1982 jointly and severally guaranteed the repayment of the principal sum to the extent of RM1.5 million together with all interest, costs and other banking charges.

The first defendant defaulted. It is the plaintiff's claim that as at 31 May 1985, the outstanding sum inclusive of interest at the rate of 14% per annum on monthly rest basis is RM2,185,092.30 made up as follows:

Principal sum	-	RM1,499,001.50
Interest from November 1982 to May 1985	-	RM 686,090.80
		RM2,185,092.30

It is the plaintiff's case that despite repeated requests and demands and a demand made through their solicitors dated 4 March 1985, the defendants failed and/or neglected and/or refused to pay the aforesaid sum or any part

thereof. By a writ and statement of claim dated 13 July 1985 the plaintiff claimed for the said sum.

On 9 August 1985 the defendants, through their solicitors, namely, Messrs Mohd Akhir & Partners, entered appearance and on 4 February 1986 filed their statement of defence. On 19 April 1986 the plaintiff filed an application to enter summary judgment pursuant to O. 14 of the Rules of the High Court 1980 ('the Rules'). On 18 December 1986 the learned senior assistant registrar allowed the application and ordered that final judgment be entered against the defendants for the said sum together with interest thereon and costs.

On 18 July 1988 the plaintiff filed a writ of seizure and sale against the third defendant. On 28 November 1988 the plaintiff was granted leave to forcibly enter the third defendant's premises. On 7 August 1989 the plaintiff obtained a prohibitory order over a piece of land held under Geran No. 7073 Lot 88, Pekan Klebang II, District of Melaka Tengah ('the said property') which is registered in the name of the third defendant.

On 15 January 1998 the plaintiff filed an *ex parte* application (encl. 10) against the third defendant for leave of the court to enforce the said judgment pursuant to O. 46 r. 2(1)(a) of the Rules which provides a writ of execution to enforce a judgment or order may not issue without the leave of the court where six years or more have lapsed since the date of the judgment or order. In its supporting affidavit, the bank provided the following reasons:

(1) *vide* notice dated 7 May 1987, they served a copy of the judgment and order of the learned senior assistant registrar on the third defendant's solicitors;

(2) since there was no response, the plaintiff filed a writ of seizure and sale to enforce the judgment;

(3) the bailiff could not carry out his duty notwithstanding the order made for forcible entry as the third defendant's premises were locked;

(4) later, upon discovering that the third defendant owned the said property, the plaintiff obtained a prohibitory order but consequently discovered that the same is charged to a financial institution and that its value was insufficient to discharge the charge;

(5) as at 31 December 1997 the third defendant is still owing the said of RM4,425,476.65 and as that sum is still outstanding, the plaintiff intends to take out bankruptcy proceedings against the third defendant and hence, the application, *ie*, encl. 10.

A statement of account prepared by the plaintiff which is attached to their afidavit in support read –

Statement of account as at 31st December 1997

Judgment sum	RM2,185,092.30
Add: Interest at 14% per annum on monthly rests from 1/6/1985 to 18/12/96	RM 525,344.70
Add: Interest at 8% per annum from 19/12/1986 to 31/12/1997	RM2,394,689.65
	RM5,105,126.65
Less: Payments	RM 680,000.00
	RM4,425,126.65
Add: Costs	RM 350.00
Amount due as at 31/12/97	RM4,425,476.65

On 23 April 1998 the learned senior assistant registrar granted the leave sought for above ('the said order').

On 11 December 1998 the third defendant filed an application (encl. 19) seeking the following reliefs –

(a) that leave or an extension of time be granted for him to file this application;

(b) that the said order of the learned senior assistant registrar dated 23 April 1998 be set aside.

In his affidavit in support the third defendant explained he was only informed of said order on 14 November 1998 when his wife was informed that their joint bank account has been frozen by the bank as a result of a bankruptcy notice filed against him on 30 April 1998. He immediately instructed his solicitors, Messrs Thiyages, Pauline Ng & Co to make a search at the Melaka High Court registry in relation to the bankruptcy proceedings and was subsequently shown copies of the bankruptcy notice and the cause papers relating to the action and the summary judgment entered against him. He contended he never consented to the said Messrs Mohd Akhir & Partners to act for him in the action brought by the plaintiff and was only made aware when he was shown the said cause papers by Messrs Thiyages, Pauline Ng & Co and hence, the application.

The third defendant pointed out the summary judgment entered against him was obtained more than eleven (11) years ago and in the plaintiff's application for leave to enforce the judgment, they never forwarded any appropriate

reasons as to why there was a delay of more than six (6) years. Further, since judgment was obtained against him as guarantor, he would now not be in a position to seek indemnity from the other defendants as his right to do so is caught by the provisions of the Limitation Act 1953. He stressed he is now prejudiced by the delay on the part of the plaintiff to enforce the said judgment and pointed out that the judgment sum has now almost doubled in amount.

In his affidavit in opposition, the plaintiff contended the defendant cannot make such an application, *ie*, encl. 19. They pointed out the cause papers show that Messrs Mohd Akhir & Partners was acting for the third defendant who is a director of the first defendant and he cannot pursue the stand that he is not aware of the judgment entered against him. The plaintiff then explained they could not enforce the writ of seizure and sale, filed in court on 18 July 1988 for the same reasons as stated earlier.

The learned senior assistant registrar dismissed the third defendant's application on 27 January 1999 and hence, this appeal (encl. 17). On 28 July 1999 I allowed the appeal with costs and against that decision the plaintiff has appealed to the Court of Appeal.

Order 46 r. 3 of the Rules *inter alia* read –

(1) An application for leave to issue a writ of execution may be made *ex parte* by summons in Form 91.

(2) Such an application must be supported by an affidavit –

(a) identifying the judgment or order to which the application relates and, if the judgment or order is for the payment of money stating the amount originally due thereunder and the amount due thereunder at the date of the application;

(b) stating, where the case falls within r. 2(1)(a), the reasons for the delay in enforcing the judgment or order;

(c) ... ;

(d) ... ;

(e) giving such other information as is necessary to satisfy the Court that the applicant is entitled to proceed to execution on the judgment or order in question and that the person against whom it is sought to issue execution is liable to execution on it.

Order 46 r. 3, *inter alia*, provides the court hearing such application may grant leave in acordance with the application. In *Tio Chee Hing v. Chung Khiaw Bank Ltd* [1981] 1 MLJ 227 Chang Min Tat FCJ said (at p. 227) –

> Where six years have elapsed, Order 42 rule 23 Rules of the Supreme Court 1957 (with certain differences that are of no materiality in the application for leave, now Order 46 rule 2, Rules of the High Court 1980) requires leave of the court to be obtained. The court has a discretion in the matter and may exercise its discretion in favour of the applicant if satisfied that he is entitled to issue execution and with the cause or causes of the delay.

In my view the only issue arising in this application is whether the learned senior assistant registrar exercised her discretion judiciously in granting leave under O. 42 r. 2 of the Rules. What were the reasons for the delay on the part of the plaintiff in enforcing the judgment obtained against the third defendant? It is not disputed that summary judgment was entered against, *inter alia*, the third defendant on 18 December 1986. What happened within the six years from the date of judgment as far as execution is concerned? The evidence show the plaintiff at the outset actively pursued the matter and on August 1989 obtained a prohibitory order over the said property. However, what happened between 7 August 1989 ie, the date when they obtained the prohibitory order and 15 January 1998, ie, the date when the plaintiff obtained the said leave under O. 46 r. 2(1)(a) (encl. 10), has not been sufficiently illustrated in the reasons forwarded by the plaintiff. In this respect the plaintiff stated upon discovering that the third defendant owned the said property, they obtained a prohibitory order, ie, on 7 August 1989 but consequently discovered that the same is charged to a financial institution and that its value was insufficient to discharge the charge. No reasons for the delay in making this application, ie, encl. 10 were presented. O. 46 r. 3(2)(b) clearly states the applicant must state the reasons for delay in enforcing the judgment or order. The plaintiff do not seem to have forwarded any. In my view the plaintiff must forward a reasonable explanation for the court to exercise such discretion in the matter in their favour. With respect, the learned senior assistant registrar seem to have unreservedly accepted the reasons forwarded by the plaintiff without considering the requirements provided for under O. 46 r. 3(2) of the Rules. As to whether the plaintiff can recover judgment interest after the expiration of 6 years from the date on which interest became due, as illustrated in their "Statement of account as at 31 December 1997", reproduced earlier, has also not been sufficiently canvassed by counsel for the plaintiff when he applied for leave before the learned assistant registrar.

Another point raised by counsel for the plaintiff in the appeal before me is that since Messrs Mohd Akhir & Partners are the solicitors on record representing the third defendant, Messrs Thiyages, Pauline Ng & Co who currently represents the third defendant has no *locus standi* to act for him as there has been no change of solicitors. In arguing this point counsel referred to O. 64 r. 1 of the Rules which provides unless and until notice of change is filed and served in accordance with this rule, the former solicitor shall be considered solicitor of the party until the final conclusion of the cause or matter. There is however nothing in the plaintiff's affidavit to show that this point was raised therein. At the hearing of this appeal counsel for the plaintiff stated that this issue was raised at the hearing of encl. 19 before the learned senior assistant registrar and she was of the view that Messrs Thiyages, Pauline Ng & Co had no *locus standi* since no change of solicitors has been filed. He pointed out notwithstanding the learned senior assistant registrar's view, Messrs Thiyages, Pauline Ng & Co proceeded to file this appeal. I am not aware as to whether the learned senior assistant registrar dismissed encl. 19 based on this point. I would agree with counsel for the plaintiff that execution proceedings is the taking of a further step in an existing action rather than the commencement of a new action and Messrs Thiyages, Pauline Ng & Co should have complied with O. 64 r. 1 of the Rules. However, seeing that it is not clear as to whether the learned senior assistant registrar dismissed encl. 19 on this point and looking at the circumstances of the case, I am of the view that such an omission is not fatal. To rule otherwise would cause injustice to the third defendant as surely he cannot be faulted for such omission.

Under the circumstances discussed earlier, I am of the view that the learned senior assistant registrar has not exercised the discretion vested in her judiciously and I accordingly allowed the appeal (encl. 17) with costs the effect of which is the leave granted by the learned senior assistant registrar on 23 April 1998 is hereby set aside.